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8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION**

11 JASON KIM,  
12 vs. Plaintiff,  
13 THE GUARDIAN LIFE  
14 INSURANCE COMPANY OF  
15 AMERICA; and DOES 1 through 10,  
16 inclusive,  
17 Defendants.  
18  
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Case No.: 8:23-cv-01579-DOC-ADS  
Action Filed: August 23, 2023  
Trial Date: April 15, 2024

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**PLAINTIFF JASON KIM'S  
RESPONDING TRIAL BRIEF**

DATE: April 15, 2024  
TIME: 8:30AM  
JUDGE: Honorable David O. Carter  
CTRM: 10A, Santa Ana



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1      **1. INTRODUCTION**

2      The Guardian Life Insurance Company of America (“Guardian”) does not  
3      question that Plaintiff Jason Kim (“Plaintiff”) was disabled during the time in  
4      dispute between the parties. Instead, it focuses solely on the pre-existing condition  
5      exclusion in the long-term disability (“LTD”) policy (the “Policy”) at dispute in this  
6      matter. Guardian presented the Court with a trial brief that mischaracterizes facts,  
7      omits key information, and fails to understand the difference between minor long-  
8      term non-disabling depression and anxiety versus a complete psychotic breakdown  
9      triggered by COVID-19 which then led to a prescription of medication (Zyprexa, an  
10     anti-psychotic medication) that caused his tardive akathisia (“TA”) and tardive  
11     dyskinesia (“TD”) conditions. The Policy’s pre-existing condition exclusion  
12     requires Guardian to prove that the pre-existing conditions or treatment related  
13     thereto caused or substantially contributed to the disability. Here, the pre-existing  
14     conditions on which it relies **did not** cause or contribute to Plaintiff’s disability.

15     Guardian inaccurately asserts that no treating physician agrees with Plaintiff’s  
16     position that his disability due to TA and TD were caused by complications related  
17     to the treatment of COVID-19 symptoms. It falsely insists that all physicians agree  
18     that Plaintiff’s pre-existing conditions – his minor anxiety and depression – caused  
19     or substantially contributed to his disability. **Not only do Plaintiff’s treating**  
20     **physicians agree with him, but Guardian’s own peer-review psychiatrist,**  
21     **Elbert Greer Richardson, M.D., specifically explained that Plaintiff’s pre-**  
22     **existing mental health conditions did not cause or contribute to Plaintiff’s**  
23     **disability.** Dr. Richardson explicitly rejected Guardian’s position in this matter.  
24     Guardian’s untenable position is analogous to someone having a cold during a  
25     lookback period, and arguing that later contracted pneumonia and COVID-19 are  
26     pre-existing conditions just because all three involve coughing. Here, in its  
27     egregious cherry-picking of evidence expedition, Guardian failed to accept the  
28     opinions of its own doctor. It denied Plaintiff’s claim for the same inaccurate



1 reasons that it now presents in its trial brief. This reasoning is highly flawed and  
2 should be rejected by the Court.

3 While Guardian concedes that Zyprexa caused the TA and TD conditions, it  
4 argues that Plaintiff was prescribed this medication to treat his pre-existing  
5 condition. This is incorrect. Not only did Guardian's own doctor reject this  
6 argument, but so have Plaintiff's treating physicians. Plaintiff's medical records  
7 have multiple notes from his neurologist specifically explaining that COVID-19  
8 likely caused his symptoms that ultimately led to his disability. The evidence points  
9 to one conclusion: Plaintiff was prescribed this medication to treat his psychotic  
10 breakdown, *a condition for which he was never previously treated*. His neurologist  
11 even provided scientific studies supporting this position. And, Richard Moldawsky,  
12 M.D., Plaintiff's initial psychiatrist, acknowledged that this was likely true.  
13 Guardian focused on Dr. Moldawsky's diagnoses of anxiety and depression as  
14 evidence of its position. However, Dr. Moldawsky specifically acknowledged that  
15 COVID-19 likely caused the health problems that Plaintiff was suffering from and  
16 he acknowledged that there was a break in the chain of causation. Whereas Dr.  
17 Moldawsky referenced anxiety and depression in the medical records that he  
18 authored, subsequent analyses explain that Plaintiff suffered from far more than  
19 simple anxiety and depression.

20 Carolyn Neff, M.D., one of Plaintiff's neurologists, specifically explained  
21 both the COVID-19 connection and how Plaintiff suffered from advanced  
22 psychosis, not low grade, non-disabling anxiety and depression. Guardian's  
23 consulting doctor, Dr. Richardson, reached a similar conclusion. He explained that  
24 the medications that induced Plaintiff's TA and TD were prescribed after the  
25 lookback period to treat psychosis. He also explained that Plaintiff suffered from  
26 hyperkinetic movement disorder during this time, which Dr. Moldawsky did not  
27 even address. Ultimately, Dr. Moldawsky's medical records were very vague and  
28 basic. In addition to the mischaracterization of Plaintiff's medical records,



1 **Guardian's only other support is that of a single peer-review doctor who never**  
2 **even reviewed Plaintiff's medical records.** Guardian only presented the doctor  
3 with an inaccurate summary, not Plaintiff's actual medical records. In short, he did  
4 not have the necessary information to reach the conclusions that he reached.  
5 Guardian's argument is ultimately based on an incomplete and misleading review of  
6 the Administrative Record ("AR"). Plaintiff's pre-existing conditions, and the  
7 treatment thereof, did not cause or contribute to his disability.

8       Guardian also argues that even if Plaintiff's disability was not caused by  
9 a pre-existing condition (it was not), then, at a minimum, his pre-existing conditions  
10 substantially contributed to the disability. Again, Guardian fails to differentiate  
11 between barely symptomatic low grade non-disabling depressive disorder and  
12 anxiety as opposed to a full psychotic breakdown caused by a virus which then led  
13 to a prescription of medication that caused his TA and TD conditions. It mistakenly  
14 treats one as a continuation of the other. This is incorrect. Dr. Richardson explicitly  
15 rejected Guardian's position. He stated that there was no connection at all.  
16 Guardian has no evidence to refute this conclusion. Guardian's insistence that Dr.  
17 Richardson's report supports its position is blatantly false.

18       Ultimately, Guardian insists that persistent mild/asymptomatic depression and  
19 anxiety, or their treatment, caused a complete psychotic breakdown. This, in turn,  
20 led Plaintiff to take the medications that triggered his TA and TD. Guardian has the  
21 burden of establishing that position. Even its own expert rejected that argument.  
22 The Court should reject it as well and enter judgment in Plaintiff's favor.

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1       2. **THE PLAN'S PRE-EXISTING CONDITION EXCLUSION DOES**  
2       **NOT BAR PLAINTIFF'S RECOVERY<sup>1</sup>**

3           A. **Plaintiff's Pre-Existing Conditions of Mild Anxiety and Depression**  
4           **Did Not Cause His Disability<sup>2</sup>**

5           Guardian argues that Plaintiff suffered from depression and anxiety during the  
6 lookback period, that the depression and anxiety became severe, that he took  
7 Zyprexa for that specific depression and anxiety, and that the treatment of the pre-  
8 existing conditions caused Plaintiff's TA and TD. ECF 27 at 17-18.<sup>3</sup> Guardian  
9 attempts to establish the above through various arguments. Each argument lacks  
10 merit.

11          In an attempt to meet its burden of establishing its argument and that the  
12 exclusion applies,<sup>4</sup> Guardian creates a false image that Plaintiff's mental health was  
13 quickly deteriorating before he developed COVID-19. ECF 27 at 18-19. It  
14 discusses a variety of conditions with absolutely no connection to Plaintiff's mental  
15 health or disability, such as sleep and chest pain problems. *Id.* **Without any**  
16 **medical support**, Guardian insinuates that these were related to Plaintiff's mental  
17 health issues. *Id.* These insinuations are incorrect and without medical support. No  
18 medical professional supported any such conclusion.

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19          <sup>1</sup> Plaintiff provided a detailed statement of facts in his opening trial brief. He  
20 incorporates it by reference into this brief. ECF 28 at 3.

21          <sup>2</sup> Guardian appears to concede that Plaintiff was disabled during the time period in  
22 question. As such, Plaintiff will not address his disability status in this brief. He  
23 addressed that issue at length in his opening trial brief and incorporates that  
argument by reference. ECF 28 at 20.

24          <sup>3</sup> Plaintiff does not dispute that he took Lexapro during the look back period or that  
25 Zyprexa caused his TA and TD. Indeed, Plaintiff embraces the finding that  
Zyprexa, **taken for his psychosis that was not a pre-existing condition**, caused his  
TA and TD.

26          <sup>4</sup> Guardian has the burden of establishing that the pre-existing condition exclusion  
27 applies in this matter. *See Dowdy v. Metropolitan Life Ins. Co.*, 890 F.3d 802, 810  
(9th Cir. 2018).



1       Guardian then emphasizes that Plaintiff contacted Dr. Moldawsky in  
2 November 2019, arguing that Plaintiff's condition was quickly deteriorating during  
3 the end of 2020. It concludes that Plaintiff's mental health deteriorated, that he took  
4 the Zyprexa because of his low grade, non-disabling depression and anxiety, and  
5 that the medication caused his TA and TD. As such, it claims that pre-existing  
6 conditions caused Plaintiff's disability.

7       The problem with this argument is that its own peer-review physician rejected  
8 it. When addressing Plaintiff's claim for LTD benefits, Guardian submitted  
9 Plaintiff's medical records to Dr. Richardson. (AR:5375) Dr. Richardson examined  
10 Plaintiff's medical records and spoke with one of Plaintiff's psychiatrists, Robert  
11 Lee, D.O., M.S. (AR:5378) He was informed of Plaintiff's medical history and  
12 explained:

13       I was able to speak with Dr. Lee. I discussed my name, the claimant's  
14 name, the time frame in question and the purpose of my call. During  
15 the time frame in question, there was no contact with Dr. Lee. The  
16 claimant was on Lexapro 5mg per the chart, but he was not seen until  
November 2020. From April 2019-November 2020, he was not seen  
for mental health symptoms by Dr. Lee or at his practice. (AR:5378)

17       Having conversed with one of Plaintiff's treating physicians, and having  
18 reviewed Plaintiff's medical records, Dr. Richardson addressed Guardian's specific  
19 questions. He concluded that Plaintiff had pre-existing conditions that he received  
20 advice or treatment for. (AR:5379) However, when addressing Plaintiff's  
21 disability, he explained:

22       The claimant has restrictions and limitations as of 3/25/21....

23       **The conditions the claimant received advice, treatment, or**  
**medication caused by, contributed to by, or resulting from those**  
**conditions between 2/1/20-4/30/20; did not cause or contribute to**  
**the conditions that are impairing as of 3/25/21.** (AR:5379)  
(Emphasis added.)

27       Dr. Richardson then proceeded to find that Plaintiff was disabled from  
28 January 2021 through July 4, 2021. (AR5379-81) Dr. Richardson conclusively

1 opined that Plaintiff's conditions and medical treatment during the lookback period  
2 **did not cause or contribute to Plaintiff's disability.** He obviously concluded that  
3 just because Plaintiff suffered from mild depression and anxiety during the lookback  
4 period does not mean that those conditions caused or contributed to a psychotic  
5 breakdown in 2021. In fact, there are no test or other results saying that Plaintiff's  
6 conditions were anything but asymptomatic during the lookback period. (AR:881)  
7 Dr. Richardson's report explained that, in January 2021, Plaintiff suffered from the  
8 disabling conditions of psychosis and hyperkinetic movement disorder. (AR:5376,  
9 5380) Hyperkinetic movement disorder was the disabling condition that caused  
10 Plaintiff's constant pacing that resulted in him wearing through a pair of shoes in a  
11 few days. (AR:691) Guardian's own psychiatrist rejected Guardian's argument.

12 As for Plaintiff contacting Dr. Moldawsky in November 2020, Guardian  
13 failed to inform the Court that Dr. Moldawsky's call log specifically refutes  
14 Guardian's image that Plaintiff's mental health was quickly deteriorating. It omits  
15 the contents of a December 3, 2020 conversation with Dr. Moldawsky's staff. In it,  
16 Plaintiff explained why he contacted Dr. Moldawsky about a new depression  
17 treatment methodology, TMS. Plaintiff stated, "I don't think it's like emergency  
18 severe symptoms and just underlying over the years. I've tried medications, I exer-  
19 cise, eat right, meditate and family members have had success with it." (AR:5581)  
20 He was looking to try a new treatment for the same minor symptoms that he had felt  
21 over the years. Contrary to Guardian's arguments, it was not an escalation of his  
22 symptoms. Even several months after the end of the lookback period, Plaintiff was  
23 barely symptomatic. Guardian's characterization of Plaintiff's contact of Dr.  
24 Moldawsky does not reflect the facts or evidence in the AR.

25 Guardian focuses on the fact that the records from Dr. Moldawsky reference  
26 anxiety and depression. However, it fails to acknowledge that Dr. Moldawsky's  
27 medical records also state that "Wife is quite convinced that his cog[nitive] abilities  
28 are worse than before, and, that this is associated with COVID effects on the brain[.]



1 I discussed with them that **this could be in part true**, but I do think the primary  
2 psych disorder is the more salient factor.” (AR:786) (Emphasis added.) Dr.  
3 Moldawsky was aware of all of the symptoms when he prescribed Zyprexa.  
4 Guardian’s insistence that Plaintiff’s psychosis was simply a more severe form of  
5 his prior anxiety and depression does not match the facts or evidence. Its insistence  
6 that Zyprexa was prescribed for depression and anxiety as opposed to this larger  
7 psychosis is inaccurate. He was prescribed Zyprexa for psychosis, not for his prior  
8 mild anxiety and depression. Dr. Richardson cites to Dr. Carolyn Neff’s comments  
9 that clearly make that distinction. (AR:5376) When addressing Plaintiff’s  
10 hospitalization in March 2021, Dr. Neff explains that Plaintiff had been taking  
11 Zyprexa for “psychosis.” (AR:5376) This means that when Dr. Moldawsky  
12 prescribed the medications, it was for psychosis, not for anxiety or depression.  
13 Plaintiff’s neuropsychological evaluation also makes that distinction when analyzing  
14 Plaintiff’s medical history. (AR:707-08, 987) Guardian’s characterization of why  
15 Plaintiff was prescribed the medication, and his mental health problems, is  
16 inaccurate. There is a clear delineation between the pre-existing conditions and the  
17 severe psychotic and TA and TD conditions that Plaintiff started suffering from in  
18 January 2021.

19 Guardian also attempts to deflect the significance of Plaintiff’s COVID-19. It  
20 emphasizes that Plaintiff’s January 4, 2021 visit with Dr. Moldawsky was before he  
21 was diagnosed with COVID-19. However, January 7, 2021, was when Plaintiff  
22 **tested** positive for COVID-19. (AR:691, 3258, 3411)<sup>5</sup> He was symptomatic as of  
23 January 5. (AR:2040, 3258, 3411) Given that his January 4, 2021 visit with Dr.  
24 Moldawsky was a telephonic healthcare visit (AR:2238), Dr. Moldawsky could not  
25 have known that Plaintiff almost certainly had COVID-19 when his January 4, 2021,

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26 <sup>5</sup> Guardian inaccurately states that Plaintiff tested positive for COVID-19 on  
27 January 10, 2021. ECF 27 at 7. Different parts of the AR provide different dates.  
28 However, the majority of sources in the AR list him as testing positive on January 7.



1 symptoms started. In fact, contrary to Guardian's assertions, Plaintiff's neurological  
2 medical records from Dr. Neff's treatments specifically state that his COVID-19  
3 likely caused his sudden deterioration in January 2021. They state: "Note: onset of  
4 psychosis and anxiety after covid in January, **medical literature support this is a**  
5 **possible sequelae.**" (emphasis added). (AR:707-08) Plaintiff's medical records  
6 from March 25, 2021 also noted that these changes were a "possible post viral  
7 event[.]" (AR: 695) Robbin Holley, BHCM, a Guardian employee, made a note  
8 that explained:

9 The case could be strongly made [that] the problems with COVID-19  
10 as well as his subsequent (& rather marked) problems with adverse  
psychiatric medication reactions strongly exacerbated his MH issues.  
11 One MD noted his problems as a possible sequela and noted recent  
research showing that 34% of COVID-19 survivors subsequently  
12 receive a neurological or psychiatric DC & 17% are specifically DX's  
with Anxiety. (AR:562-63)

14 Many complications with COVID-19 are neurological in nature. A  
15 psychiatrist, such as Dr. Moldawsky, likely would not know about or understand  
16 many of the related medical issues. COVID-19 was still a new disease and its  
17 effects were not well understood. Even if Dr. Moldawsky understood certain basic  
18 issues involving neurology, this was something much more advanced. Dr. Neff, in  
19 fact, had to cancel the medication that Dr. Moldawsky had erroneously prescribed,  
20 the very medication that was disabling Plaintiff. Of note and as explained above,  
21 even Dr. Moldawsky acknowledged that COVID-19 could have caused Plaintiff's  
22 symptoms.

23 Guardian's opening brief fails to address any of this. Instead, it falsely argues  
24 that Plaintiff's COVID-19 symptoms "were the same or similar symptoms of  
25 depression and anxiety for which he had been treated previously." ECF 27 at 19. It  
26 further falsely argues that the Zyprexa, an antipsychotic medication, was only for  
27 anxiety and depression, and, therefore, the treatment of pre-existing conditions  
28



1 caused Plaintiff's TA and TD. The fact that Zyprexa caused the TA and TD is not  
2 disputed. However, Guardian's analysis could not be more inaccurate.

3 By January 4, 2021, Plaintiff's condition had fundamentally changed. An  
4 examination from the rest of Plaintiff's medical records reveals how misguided the  
5 narrative Guardian provided the Court is. For example, Plaintiff's  
6 neuropsychological evaluation explained that:

7 Mr. Kim and his wife reported that he contracted covid-19 in early  
8 January 2021. After that time he began experiencing difficulties with  
9 attention, increased anxiety, restlessness, and **new onset of psychosis**.  
10 They reported that he had 4 days of pressure in his head and he took  
11 ibuprofen. He began pacing outside at night and could not sleep. He  
12 began with odd cognition and panic. He reported foggy recall about all  
13 of those incidents. He began panicking about work related topics. His  
14 wife reported that he became agitated and his affect changed. He was  
15 up all night for 4 total days without any sleep. He was very apathetic to  
16 things and did not have any enjoyment. (AR:987) (Emphasis added.)

17 Of note, all of these symptoms occurred before he was prescribed Zyprexa.  
18 (AR:987) They were related to his COVID-19 infection.

19 Guardian further argues that Plaintiff's position that COVID-19 caused his  
20 condition is allegedly based purely on the "say-so" of his family members. ECF 27  
21 at 21. Guardian then provides extensive case law for the proposition that statements  
22 from family should be accorded "less" weight. ECF 27 at 22. Guardian further  
23 argues that "Indeed, courts have consistently held that a claimant's self-reported  
24 statements concerning his own disability are not entitled to weight where they are  
25 not supported by objective medical evidence." ECF 27 at 22.

26 This argument has numerous flaws. As noted above, Plaintiff's treating  
27 physicians explicitly support the fact that COVID-19 caused Plaintiff's symptoms.  
28 (AR:695, 707-08) As for Dr. Moldawsky, he did not deny that COVID-19 could  
have caused them either. (AR:786) Even Guardian's own employee acknowledged  
that COVID-19 may have caused Plaintiff's symptoms. (AR:562-63) And, the AR  
contains the summary of a study that explained that COVID-19 causes psychosis in



1 1.4% of people. (AR:708) As such, not only do medical professionals agree with  
2 Plaintiff, but there is even scientific evidence supporting their conclusions.  
3 Guardian's attempt to characterize Plaintiff's contentions as solely coming from his  
4 family's "say-so," is erroneous. This argument can be completely rejected.

5 Furthermore, of note, Plaintiff's family members **are trained therapists.**  
6 (AR:2268, 3910) The entire basis of the case law that Guardian relies on to  
7 undermine their opinions focuses on the untrained nature of a claimant's family.  
8 However, Plaintiff's wife and her parents are well-trained therapists. In fact,  
9 Plaintiff's wife's opinion was vindicated. Doctors, including Dr. Moldawsky, kept  
10 discounting Mrs. Kim's insistence that a neurologist become involved in Plaintiff's  
11 treatment because she believed that these new psychological problems were  
12 neurological in nature. (AR:2334) She had to desperately fight when the drugs that  
13 Dr. Moldawsky had prescribed were disabling her husband. When she finally  
14 succeeded in getting a neurologist to treat her husband, she was vindicated. The  
15 neurologist explained that all of Plaintiff's symptoms from January 2021 onward  
16 were likely tied to COVID-19 and that the drugs that Dr. Moldawsky had prescribed  
17 were doing incredible neurological harm to Plaintiff. Mrs. Kim's professional  
18 judgment was proven correct. She is a highly trained therapist who saved her  
19 husband by recognizing that he had a neurological problem.

20 Guardian's own case law, *Stratton v. Life Insurance Co. of North America*,  
21 589 F.Supp.3d 1145, 1175 (S.D. Cal. 2022), supports this proposition. In *Stratton*,  
22 the claimant was a senior executive partner who started suffering from severe back  
23 problems. *See id.* at 1149. He had LTD insurance with LINA. *See id.* at 1147-48.  
24 LINA denied his claim for LTD benefits. *See id.* at 1172. When addressing the  
25 relevant legal standards, the *Stratton* court explained:

26 Narratives provided by the claimant and any family and friends are  
27 properly accorded less weight than medical evidence in the record given  
28 their potential for bias and inability to "diagnose ... medical condition[s]"  
or assess ... functional capacity in the way individuals trained in the



1 medical field can.” *Shaw*, 144 F. Supp. 3d at 1136, 1139. **Accordingly,**  
2 “[r]eports from individuals with no medical background cannot  
overcome medical evidence.” *Id.* at 1136 (Emphasis added).

3 *Id.* at 1175. The Court then applied the standard to the medical opinions before it.  
4 It concluded that the claimant’s treating physicians were persuasive because of the  
5 evidence they cited. The insurer’s peer review doctors were not persuasive because  
6 they failed to provide an accurate evidentiary basis for their conclusions. *See id.* at  
7 1175-79.

8 Here, not only did Plaintiff’s treating physicians support that COVID-19  
9 caused Plaintiff’s disability, but Plaintiff’s medical records even cite the relevant  
10 studies. Furthermore, Plaintiff’s family has the medical background to provide  
11 insightful and medically meaningful assessments. They observed Plaintiff and  
12 could competently describe their observations. Under the case law, these opinions  
13 are entitled to deference.

14 In support of its position that Plaintiff’s COVID-19 was not the cause of his  
15 disability, Guardian relies on the opinion of Arnold Lentnek, M.D. Dr. Lentnek’s  
16 opinion was addressed at length in Plaintiff’s opening trial brief. He concluded that  
17 COVID-19 did not cause Plaintiff’s symptoms in January 2021. (AR:5409-10)  
18 However, of critical note, **Dr. Lentnek never saw Plaintiff’s medical records.**  
19 Guardian ignores this highly salient fact. As explained in the AR:

20 Panel review with Dr. Lentnek took place on 07/05/22. **Dr. Lentnek**  
21 **states he had access to only “abstracted” records, but based on**  
22 **what he was provided**, the claimant had a mild course of COVID-19  
and that would not cause any restrictions. (AR:5417) (Emphasis added.)

23 This is particularly problematic. **Dr. Lentnek could not have developed an**  
24 **independent and objective opinion because he only saw what Guardian wanted**  
25 **him to see and then only “abstracts” of these records.**<sup>6</sup> Guardian argues at length

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27 <sup>6</sup> There is no explanation of what “abstracted” records are or how they differ from  
28 the actual medical records. They are not contained in the AR so it left to one’s

Footnote continues on next page...



1 that the Court should rely on objective and unbiased opinions over that of an  
2 emotional untrained family member. However, Guardian has not provided the  
3 Court with a single independent, objective, and unbiased medical professional who  
4 had before him complete medical records, supporting its position.

5 Furthermore, Dr. Lentnek never addressed how Plaintiff's treating physician  
6 did support the fact that COVID-19 possibly caused Plaintiff's symptoms. (AR:695,  
7 707-08,) He likely did not even know of this fact because of Guardian's failure to  
8 provide him with the relevant actual records. Those records, which were almost  
9 certainly not "abstracted," documented the medical studies specifically supporting  
10 Plaintiff's and his treating physicians' contentions that COVID-19 caused his  
11 condition. 29 C.F.R. Section 2560.503-1 (j)(6)(i)(A) states that an insurer must  
12 provide "an explanation of the basis for disagreeing with or not following . . . the  
13 views presented by the claimant to the plan of health care professionals treating the  
14 claimant and vocational professionals who evaluated the claimant . . ." Dr.  
15 Lentnek's complete failure to address the evidence that COVID-19 caused his  
16 condition left Guardian with insufficient information to rely upon his opinion when  
17 addressing Plaintiff's claim. *See also Miller v. PNC Financial Servs. Group, Inc.*,  
18 278 F.Supp.3d 1333, 1344-45 (S.D. Fla. 2017). Dr. Lentnek's opinion is  
19 uninformed and should not persuade the Court of anything but Guardian's bad faith  
20 in addressing Plaintiff's claim.

21 Guardian argues that:

22 The well-supported opinion of a peer reviewer is entitled to credit over  
23 the unsupported opinion of a treating physician, let alone the conclu-  
24 sory statements of a lay claimant or his family members. *Ibrahim v.*  
25 *Bayer Corp. Disability Plan*, 584 Fed.Appx. 743, 745 (9th Cir. 2014);  
*Biggar*, 274 F.Supp.3d at 968; *Sanchez-Levine v. Metro. Life Ins. Co.*,

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26 imagination as to how the records were "abstracted." It is disturbing that Dr.  
27 Lentnek did not request the actual medical records so he could better understand  
28 Plaintiff's medical issues and treatment.



1                   2017 WL 4286139, \*10 (C.D. Cal. 2017); *Johnson*, 2017 WL 6043086  
2                   at \*6; *Shaw*, 144 F.Supp.3d at 1130.

3                   ECF 27 at 23.

4                   This choice of wording is interesting since Plaintiff's treating physicians  
5                   explicitly provided studies supporting their conclusions that COVID-19 caused his  
6                   condition, yet Guardian relied on the completely cursory, conclusory, and  
7                   unsupported opinion of a peer-review doctor who never even read Plaintiff's  
8                   medical records.

9                   The case law that Guardian relies on is inapplicable or supports Plaintiff's  
10                  position. It cites to several cases for the proposition that “[t]he well-supported  
11                  opinion of a peer reviewer is entitled to credit over the unsupported opinion of a  
12                  treating physician, ....” ECF 27 at 23. But, as discussed above, because the one  
13                  paper reviewer Guardian relied on was not “well-supported,” these cases are  
14                  inapposite. For example, *Ibrahim v. Bayer Corp. Disability Plan*, 584 F.App'x 743  
15                  (9th Cir. 2014), was a two-page opinion involving a disability claim governed by the  
16                  abuse of discretion standard under ERISA. The opinion merely states that a  
17                  conclusory and belated opinion can be discounted under that standard of review if  
18                  the peer-review doctor provides a reasoned opinion. Here, it was the *treating  
19                  physicians* who provided the reasoned opinions as contrasted with a biased peer-  
20                  review doctor who had not even reviewed Plaintiff's medical records. *Ibrahim*  
21                  supports the likelihood that Plaintiff would be entitled to benefits under the abuse of  
22                  discretion standard, as well as the current de novo standard of review.

23                  Moreover, *Sanchez-Levine v. Metropolitan Life Insurance Co.*, 2017 WL  
24                  4286139, \*\*10-11 (C.D. Cal. 2017), does not support Guardian's position either.  
25                  There, even the claimant's own treating physicians did not support continuous  
26                  disability and failed to provide a basis for their opinions that did not contradict the  
27                  medical evidence. Here, the treating physicians were able to examine Plaintiff and



1 they cited the scientific studies supporting their conclusions – surely a sign that their  
2 positions have a scientific and appropriate medical basis.

3       Ultimately, Guardian’s trial brief omits numerous critical facts and  
4 mischaracterizes others. It is highly unpersuasive, and the Court should readily  
5 reject the arguments therein. For the reasons explained above, and in Plaintiff’s  
6 opening trial brief, judgment should be entered in Plaintiff’s favor.

7       **B. A Pre-Existing Condition Did Not Substantially Contribute to**  
8       **Plaintiff’s Disability**

9       Guardian argues that, at a minimum, a pre-existing condition substantially  
10 contributed to Plaintiff’s disability. ECF 27 at 23. Guardian argues that even if  
11 depression and anxiety did not contribute to Plaintiff’s development of TA and TD,  
12 his depression and anxiety still substantially contributed to his disability. This  
13 argument is equally flawed.

14       As explained above, Guardian’s entire argument is based on a number of  
15 factual and analytical flaws. One significant flaw is that it fails to differentiate  
16 between (1) mild, barely present, long-term depression and anxiety, and (2) a  
17 complete psychotic breakdown triggered by some outside cause that was likely  
18 COVID-19. It treats one condition as simply a continuation on a spectrum of  
19 another. In fact, there are differences. These differences are significant. Mental  
20 health problems are very nuanced. Guardian’s own doctor, Dr. Richardson,  
21 explicitly stated that Plaintiff’s prior conditions and/or the treatment thereof **did not**  
22 **cause or substantially contribute to his disability.** (AR:5379) **There is no**  
23 **connection between the two.** As such, Guardian’s own doctor rejected this  
24 argument.

25       A comparison of two matters addressed by the Ninth Circuit readily reveals  
26 how, even if there were some negligible connection between the pre-existing  
27 conditions and the disability (there is not), it would still not rise to the level of  
28 substantial contribution. The first case is *Dowdy v. Metropolitan Life Insurance*



1     *Co.*, 890 F.3d 802, 810 (9th Cir. 2018). The second case is a case Guardian relies  
2     on, *Estate of Maurice v. Life Insurance Co. of North America*, 792 F.App'x 499 (9th  
3     Cir. 2020).

4         In *Dowdy*, the insured Tommy Dowdy had diabetes. He was in a car accident  
5     that resulted in a severe fracture to his left ankle that nearly amputated his lower  
6     leg. His ankle injury failed to improve. He was transferred back to the hospital  
7     after three months because he suffered persistent leg infections related to his original  
8     injury that would not heal due to his diabetes. His leg was amputated below the  
9     knee “due to his comorbidities” (wound issues complicated by his diabetes) and his  
10    original injury from the car accident. He submitted a claim for the dismemberment  
11    of his leg. MetLife denied his claim based on the policy’s insuring clause – which  
12    required that an accident be the “direct and sole cause” of the amputation  
13    “independent of other causes” – and the exclusion for losses “contributed to by . . .  
14    illness.” MetLife asserted that Dowdy’s diabetes contributed to the amputation and,  
15    therefore, it was not covered under the policy. *Id.* at 805-07, 811.

16         Even though the Ninth Circuit found that diabetes was a “contributing factor”  
17     to the insured’s dismemberment loss, it held the loss was covered because diabetes  
18     was not enough of a factor to meet the “substantial contribution” test, something the  
19     court said applied to the policy as a matter of law. *Id.* at 808. The court explained  
20     that “[i]n order to be considered a substantial contributing factor for the purpose of a  
21     provision restricting coverage to direct and sole causes of injury, a pre-existing  
22     condition must be more than merely *a* contributing factor.” *Id.* at 809 (emphasis  
23     original). The court reasoned that “a ‘predisposition’ or ‘susceptibility’ to injury,  
24     whether it results from congenital weakness or from previous illness or injury, does  
25     not necessarily amount to a substantial contributing cause. A mere ‘relationship’ of  
26     undetermined degree is not enough.” *Id.* at 808 (internal citations omitted).

27         The court explained that one respected source explained that the word  
28     “substantial” denotes that the conduct had an effect strong enough that it would lead



1 “reasonable [people] to regard it as a cause” in the more concrete sense and not just  
2 in some “philosophic sense.” *Id.* at 809. Ultimately, the court held that there must  
3 be evidence showing that the preexisting ailment contributed a “significant  
4 magnitude of causation” and was a “substantial catalyst.” *Id.* The preexisting  
5 condition cannot “merely [be] related to the injury.” *Id.*

6 The second case, *Estate of Maurice*, also involved an accident, diabetes, and  
7 an amputation. *See Estate of Maurice*, 792 F.App’x at 500. First, it is important to  
8 note that this unpublished case appears to be at odds with the holding in *Dowdy* and  
9 thus it should not be deemed controlling law. Second, in any event, it easily  
10 distinguishable from this case. The exclusion in dispute there was also similar to  
11 that in *Dowdy*. However, as opposed to the serious car accident in *Dowdy*, the  
12 claimant in *Maurice*’s accident was that he simply stepped on some glass. *See id.*  
13 Like in *Dowdy*, the claimant’s diabetes stopped the injury from healing properly and  
14 resulted in part of his leg being amputated. The *Maurice* court ruled that the injury  
15 was sufficiently minor that the diabetes was a much more significant catalyst of the  
16 cause of the amputation. *See id.*

17 Here, the pre-existing conditions Guardian asserts were excluded are  
18 depression and anxiety, conditions so minimal that they did not even register on the  
19 last tests before the lookback period in Plaintiff’s medical records. (AR:881) By  
20 analogy, the “accident” here was the COVID-19 that triggered the psychotic  
21 breakdown, hyperkinetic movement disorder, and other psychological problems that  
22 directly led to Plaintiff’s disability. Even if there was a connection between the pre-  
23 existing conditions and Plaintiff’s January 2021 health problems, the impact from  
24 Plaintiff’s minimal depression and anxiety from the pre-existing condition period is  
25 even less than that of the diabetes in *Dowdy*. Plaintiff would have become psychotic  
26 even without his prior barely symptomatic mild depression and anxiety. Ninth  
27 Circuit precedent supports that the depression and anxiety did not substantially  
28 contribute to Plaintiff’s disability.



1       The other case law that Guardian relies on does not change the analysis. The  
2 court in *Earle v. Unum Life Insurance Company of America*, 2021 WL 4871785, at  
3 \*1 (9th Cir. 2021), held that, but for the pre-existing condition, the covered loss  
4 would not have occurred. Here, the pre-existing condition is Plaintiff's long-term  
5 and minor depression and anxiety. But those pre-existing conditions did not cause  
6 or contribute to Plaintiff's disability. His disability occurred because of the onset of  
7 psychosis (likely caused by COVID-19 or some other cause) and the then later  
8 constellation of disabling conditions that Plaintiff suffered in January 2021. Drs.  
9 Richardson and Neff determined that there was no connection between them and  
10 Plaintiff's disability. As such, *Earle* clearly does not apply.

11       As for *Ekno v. Northwestern Mutual Life Insurance Co.*, 2008 WL 782728, at  
12 \*7 (E.D. Cal. 2008), that matter addressed an LTD claim and a pre-existing  
13 condition clause. During the lookback period, the plaintiff suffered from "severe  
14 depression." *Id.* The matter was governed by the abuse of discretion standard. The  
15 district court concluded that "Finally, while there is evidence in the record  
16 indicating that Ekno also suffers from the non-preexisting condition of  
17 *prolactinoma*, the record contains substantial evidence supporting NWML's  
18 conclusion that Ekno's disability was caused or contributed to by depression." *Id.* at  
19 \*7. Here, the standard of review is de novo, and multiple physicians, including  
20 Guardian's own peer reviewer, concluded that there is no connection between  
21 Plaintiff's **extremely mild** pre-existing conditions and his January 2021 symptoms  
22 that led to his disability. As such, *Ekno* does not support Guardian's position.

23       Ultimately, Guardian has the burden of proving that its exclusion applies. It  
24 cannot meet this burden.

25       **3. CONCLUSION**

26       For the above-stated reasons, and those in Plaintiff's Opening Trial Brief, the  
27 Court should enter judgment in Plaintiff's favor.

28



1 Dated: March 25, 2024

**McKENNON LAW GROUP PC**

2 By:

  
3 ROBERT J. McKENNON  
4 NICHOLAS A. WEST  
5 ERIK C. FRITZ  
6 Attorneys for Plaintiff, Jason Kim



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## **CERTIFICATE OF COMPLIANCE WITH L.R. 11-6.1**

The undersigned, counsel of record for Plaintiff Jason Kim, certifies that this brief contains 5,359 words (excluding the caption, any table of contents, any table of authorities, the signature block, this certification, and any indices and exhibits), which complies with the word limit of Local Rule 11-6.1.

Dated: March 25, 2024

## **MCKENNON LAW GROUP PC**

By: Nicholas A. West  
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Attorneys for Plaintiff, Jason Kim





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### CERTIFICATE OF SERVICE

17 I am employed in the County of Orange, State of California. I am over the  
18 age of 18 and not a party to the within action; my business address is 20321  
SW Birch St., #200, Newport Beach, California 92660; Fax 949-385-5165; E-mail  
address: dc@mckennonlawgroup.com.

19 I hereby certify that on March 25, 2024, I served the foregoing documents  
20 described as: PLAINTIFF JASON KIM'S REPLY TRIAL BRIEF on the interested  
parties as follows:

21 OPHIR JOHNA  
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 ECF Participant

26  **ECF/CM:** I caused a true and correct copy thereof to be electronically filed  
27 using the Court's Electronic Court Filing ("ECF") System and service was  
completed by electronic means by transmittal of a Notice of Electronic Filing on the  
28



1 registered participants of the ECF System. I served those parties who are not  
2 registered participants of the ECF System as indicated below.

3  I placed the  original  a true copy thereof enclosed in sealed envelope(s)  
4 to the notification address(es) of record and caused such envelope(s) to be  
5 delivered by  **FIRST-CLASS MAIL**  **OVERNIGHT DELIVERY**.

6  **BY E-MAIL:** I electronically transmitted a true and correct copy thereof to  
7 the notification electronic mail address(es) of record before close of business for the  
8 purpose of effecting service and the transmission was reported as complete and  
without error.

9  **FACSIMILE:** Based on  courtesy  court order  agreement of the  
10 parties, I caused a true copy thereof to be served by transmitting via facsimile  
11 machine to the notification facsimile number(s) of record before close of business.  
The transmission was reported as complete, without error.

12  **PERSONAL DELIVERY:** I caused  the original  a true copy thereof to  
13 be delivered by hand to the notification address(es) of record by an employee or  
14 independent contractor of a registered process service.

15 I am employed in the office of a member of the Bar of this Court at whose  
16 direction the service was made. I declare under penalty of perjury under the laws of  
17 the United States of America and the State of California that the above is true and  
18 correct. Executed at Newport Beach, California on March 25, 2024.

19 NAME:

20 *Debi Cartee*  
(Signature)



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